

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

SOAH DOCKET NO. 582-10-2069

TCEQ DOCKET NO. 2009-2058-MSW 2011 OCT 27 PM 1:44

IN THE MATTER OF THE
APPLICATION OF REPUBLIC
WASTE SERVICES OF TEXAS, LTD.
FOR TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
PERMIT NO. MSW-2356

§ BEFORE THE CHIEF CLERK'S OFFICE
§
§
§ OF
§
§ ADMINISTRATIVE HEARINGS
§

**APPLICANT'S REPLIES TO EXCEPTIONS SUBMITTED ON BEHALF OF THE
WALSH ALIGNED PARTIES, THE OFFICE OF PUBLIC INTEREST COUNSEL, AND
THE CITY OF ALEDO TO THE SEPTEMBER 26, 2011 PROPOSAL FOR DECISION**

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Republic Waste Services of Texas, Ltd. ("Republic"), applicant in the above styled proceeding, respectfully submits this, its Replies to Exceptions Submitted on Behalf of the Walsh Aligned Parties, the Office of Public Interest Counsel, and the City of Aledo to the September 26, 2011 Proposal for Decision in this matter.

It is Republic's position that, in the Proposal for Decision (PFD), Judge Wilfong properly evaluated all appropriate issues and that he correctly concluded that Republic established that the proposed Brazos Transfer Station complies with all applicable statutes and TCEQ rules and that the Commission should issue an order granting a permit to Republic for the facility. Exceptions to Judge Wilfong's analyses and conclusions, as set out in the PFD, have been filed on behalf of parties to this proceeding; the Walsh Aligned Parties (WAPs) consisting of Walsh Ranch Limited Partnership, ATH 1187, and Aledo Independent School District, and the Office of Public Interest Counsel (OPIC), and on behalf of one entity that is not a party: the City of Aledo (Aledo). Republic asserts that the arguments and positions presented in those Exceptions are all without merit, that all of the Exceptions should be overruled, and that the Commission should issue an order granting to Republic a permit for the Brazos Transfer Station.

I. CONTAMINATED WATER MANAGEMENT AND SANITATION
(Issues raised in WAPs' Exceptions at Section II and in OPIC's Exceptions at Section III)

Contaminated water related to the solid waste transfer operations at the Brazos Transfer Station will be managed in accordance with Exhibit A-78, the Contaminated Water Management Plan, Part III, Attachment 15 to the Application: contaminated water will be routed by the sloped

concrete floor and collected in concrete floor sumps inside the transfer station building, pumped to a contaminated water holding tank, then hauled to an approved wastewater treatment plant or to a municipal solid waste facility authorized to accept liquid waste for stabilization and disposal. The evidence in the record shows that Republic will manage sewage (domestic wastewater associated with sanitary facilities) produced at the Brazos Transfer Station using an On-Site Sewage Facility (OSSF) located on the transfer station site, Ex. A-94 and testimony of the WAP's witness, James Neyens, at Tr. vol. 4 p. 881/4-15. Mr. Neyens also testified that an OSSF is an appropriate and protective way to manage such wastewater;

Q: Now, you've actually done design for on-site sewage facilities?

A: Yes.

Q: Wouldn't you agree that a properly designed and constructed on-site sewage facility is protective of groundwater?

A: Generally, yes. If it's properly designed and properly located, yes.
Tr. vol. 4 p. 948/19-949/1

The OSSF described in Exhibit A-116 has been permitted by Parker County for the Brazos Transfer Station site. It is not disputed by any party that Parker County is the governmental entity with statutory authority to review and approve the use of that on-site sewage facility. In presenting Exhibit A-116 (which is Parker County's approval for the on-site sewage facility), Republic did not amend or change its permit application. The ALJ appropriately admitted evidence of new facts directly related to an issue that has been raised, argued, and briefed by the WAPs and OPIC at various times throughout this proceeding: wastewater management at the proposed transfer station. Neither Exhibit A-116 nor its admission into evidence in this proceeding is an amendment to Republic's permit application, major or otherwise. The WAPs acknowledged and legally admitted as much in their Response to Republic's motion to admit Exhibit A-116. Item VIII(2) in the prayer at the end of the WAP's Response was a request (in the alternative to a denial of Republic's motion) that "Republic be required to submit an amendment to its application..." Clearly, this exhibit did not and could not constitute an amendment to Republic's application.

No amendment to the application is required for or as the result of the admission into evidence of Exhibit A-116. It reflects specific facts that did not exist at the time the application was filed. Reopening the record to include them in evidence fell squarely within the provisions of TCEQ's rule at 30 TAC §80.4(c)(13), which states that an ALJ has the authority to reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to

make the record more complete. The ALJ and the Commissioners are obviously entitled to consider this evidence. The ALJ used it in preparing the PFD and the Commissioners may and should consider it in reaching a decision in this matter. Contrary to the assertions by the WAP and OPIC, neither the ALJ nor the Commissioners are limited in recommending or acting in this case to simply approving or denying the permit application. A clear example of an agency's authority to approve a solid waste permit with conditions, including the subsequent submission of conforming revisions to the plans in a permit application was the action of the Texas Department of Health (subsequently approved by the Austin Court of Appeals) in the North Alamo Water Supply case (*North Alamo Water Supply Corporation v. Texas Department of Health*, 839 S.W.2d 448 [Tex. App.--Austin, 1992, writ denied]). In that case, the court considered a challenge to a special provision in a municipal solid waste landfill permit. The challenged special provision in *North Alamo* provided:

The seasonal high water table beneath the proposed site is established ... at three (3) feet, and the liner design and soil balance shall be revised accordingly... [P]rior to any excavation on site for waste disposal purposes, the permittee shall submit to the Department the appropriate revised narrative portions, calculations, and drawings and other plans which may require revision as a result of the above limitation.

In upholding the special provision, the Austin Court of Appeals stated:

This Court has recognized that an agency permit may contain conditions that do not preclude its review as a final agency order. See *Walker Creek Homeowners Ass'n v. Tex. Dep't of Health Resources*, 581 S.W.2d 196, 198 (Tex. Civ. App. 1979, no writ). In *Walker Creek* this Court held that "agencies may set certain conditions in a permit which must be satisfied before operation under the permit may commence." *Id.* at 198. We also limited the conditions that an agency may impose and still have issued a final order to those conditions not necessitating further agency approval. *Id.* Because the conditional permit in *Walker Creek* expressly required further agency approval, we held that it was not a final order subject to judicial review... The language of the contested permit before us today requires no subsequent approval from the Department. Rather, it requires only that Browning-Ferris submit to the Department "the appropriate narrative portions, calculations and drawings and other plans which may require revision as a result of the above limitation."... Because nothing in the provision requires subsequent agency approval, we conclude that the permit is a final agency order.

North Alamo, 839 S.W.2d at 450-451.

The PFD in this case appropriately recommends permit special provisions (similar in substance and effect to those addressed by the Court in *North Alamo*) related to the issue of wastewater treatment at the Brazos Transfer Station.

2. WASTE ACCEPTANCE PLAN

(Issues raised in WAPs' Exceptions at Section III)

The WAPs claim that Republic did not provide an acceptable Waste Acceptance Plan for the Brazos Transfer Station. However, Republic has plainly and simply satisfied all applicable TCEQ rule requirements regarding these matters in its Site Operating Plan, Exhibit A-79. The TCEQ Executive Director determined that "the required information concerning general facility design, as required in 30 TAC § 330.61(b) [regarding Waste Acceptance Plan] is addressed in the Application." *Ex. A-112, RTC #20, p. 17*. The WAPs also complain that Republic does not describe the sources, types, and destination of waste processed at the Brazos Transfer Station. However, the record is clear and there is no dispute or evidence to the contrary that the sources of waste will be residences and businesses in Parker and surrounding counties (*Ex. A-67, sec. 1.1 at p. 2; Ex. A-73, sec. 2 at p. III-2-1*), that the Brazos Transfer Station will accept municipal solid waste and certain special wastes, including household and commercial waste, construction and demolition waste, yard waste, and various Class 2 and Class 3 non-hazardous industrial wastes (*Ex. A-73, sec. 2 at p. III-2-1*), and that Waste transported from the Brazos Transfer Station will be taken to the Arlington Landfill, located between Fort Worth and Dallas, for disposal (*Robert Sloan testimony, Ex. A-82, P4/L31-37*). The WAPs also persist in claiming that the volume of waste to be processed at the Brazos Transfer Station is not specified. However, the record is also clear that when the Brazos Transfer Station begins operations, it will accept and manage approximately 170 tons of waste per day (*Robert Sloan testimony, Ex. A-82, P4/L39-42 and P6/L21-39; Ex. A-83*) and that the maximum volume of waste that will be processed at the Brazos Transfer Station is 1,000 tons per day (*Ex. A-73, sec. 2 at p. III-2-1*).

3. ADEQUACY OF ROADWAYS

(Issues raised in WAPs' Exceptions at Section IV and in OPIC's Exceptions at Section II)

Traffic Projections. TCEQ's rules require that an applicant "project" facility traffic (30 TAC 330.61(i)(3)), which necessarily requires vehicle numbers to be estimated, and that is what Republic did. Exhibit A-83 contains Republic's estimates of the various types of vehicles expected to access the transfer station, distributed by access route. Mr. Sloan testified that the traffic estimates used provide a reasonable estimate of the numbers of each type of vehicle that can be expected to use each of the identified roadway segments to travel to and from the proposed Brazos Transfer Station

and that they are within his personal knowledge or the type of information commonly relied on by reasonably prudent transportation operations managers in the conduct of their affairs. He also testified that:

The 2010 collection truck numbers are based on the 2009 Duncan Brazos operating volumes, with traffic distributed on roadway segments based on travel routes to and from the transfer station to the collection routes. The 2020 and 2030 collection truck numbers are based on population data from the North Central Texas Council of Governments and the Texas State Data Center, the expected percentages of waste from various areas that will be transported to the transfer station, and the routing of collection trucks from each area to determine the roadway segments they will use near the transfer station. The data on transfer trucks is based on the numbers of trucks that will be needed to transport the incoming waste to the transfer station and the routes they will travel, and the small vehicles numbers are based on numbers of each category of small vehicles, with traffic patterns distributed in the same way as collection trucks.

Testimony of Robert Sloan, Ex.A-82 p.6/35-7/2 and 7/4-14.

Small Vehicle Estimates. Exhibit A-83 contains Republic's estimates of the various types of vehicles expected to access the transfer station, distributed by access route. Mr. Sloan testified that the traffic estimates used provide a reasonable estimate of the numbers of each type of vehicle that can be expected to use each of the identified roadway segments to travel to and from the proposed Brazos Transfer Station and that they are within his personal knowledge or the type of information commonly relied on by reasonably prudent transportation operations managers in the conduct of their affairs. *Testimony of Robert Sloan, Ex.A-82 p.7/4-14.* Mr. Sloan's testimony thus satisfied a standard that makes evidence admissible in administrative hearings even though it might not otherwise be admissible based on other evidence law requirements. *Texas Administrative Procedure Act, Government Code §2001.081.*

Exhibit A-83 and Mr. Sloan's additional testimony provide further information about the small vehicle estimates:

There was an estimate of 60 small vehicles that would be at this location, a combination of employees, visitors, vendors. And then we made an assumption that 2 percent of our total waste would come in with -- through small vehicles. And so that's how these numbers were calculated.

Tr. Vol. 2 p. 313/3-8; Ex. A-83.

Footnote 2 on Exhibit A-83 states that the average load for waste-carrying small vehicles is 500 lbs. and that the small vehicle numbers includes employees, visitors and vendors. Exhibit A-83 also shows that at a waste acceptance rate of 1,000 tons per day, 143 small vehicles would use the facility.

Two percent of the incoming waste volume would be 20 tons, which at 500 lbs. per small vehicle would represent approximately 80 vehicles. The maximum number of employees and visitors expected at the transfer station is 20 (per Exhibit A-94 p. 104), which means that vendors and others would make up about 43 small vehicles per day. Mr. Sloan also testified that the traffic patterns for small vehicles were distributed in the same way as collection trucks: based on population data from the North Central Texas Council of Governments and the Texas State Data Center, the expected percentages of waste from various areas that will be transported to the transfer station, and the routing of collection trucks from each area to determine the roadway segments they will use near the transfer station. *Testimony of Robert Sloan, Ex. A-82 p.6/37-7/2*. There is ample support in the record for the small vehicle numbers used by Republic.

Background Traffic. The WAPs assert that Republic's traffic analysis does not account for background traffic on roadways of interest near the proposed Brazos Transfer Station. They are wrong. Brian Jahn is Project Manager for DeShazo Group, Incorporated in Dallas. He has a Bachelor of Science degree in Civil Engineering and is a registered professional engineer, with over 24 years' experience, including conducting traffic studies for schools, health care centers, retail centers and other private and public projects, working as a traffic engineer and public works engineer for the City of Victoria, Texas, and as a traffic engineer for the City of Carrollton, Texas. He has served in various capacities in the Texas Section of the Institute of Transportation Engineers (TexITE), including Vice-President and President. *Ex. A-46; Brian Jahn Prefiled Testimony, Ex. A-45, P. 1/L. 1-7; Hearing Transcript Vol. 2 P. 341/L. 5-19*. Exhibit A-47 is a traffic study prepared by Mr. Jahn for the Brazos Transfer Station. *Brian Jahn Prefiled Testimony, Ex. A-45, P. 1/L. 23-30*. As required by TCEQ's rules at 30 TAC 330.61(i), Mr. Jahn's report provides data on the volume of vehicular traffic on access roads within one mile of the proposed facility, both existing and expected (background traffic), during the expected life of the proposed facility, and it includes projections of the volume of traffic expected to be generated by the facility on the access roads within one mile of the proposed facility. *Ex. A-47*. Mr. Jahn testified that, in his opinion, the operation of the proposed Brazos Transfer Station will not result in any significant traffic impacts to area roadways and the roadways used for access to the transfer station will be adequate for the traffic associated with the transfer station. *Brian Jahn Prefiled Testimony, Ex. A-45, P. 3/L. 10-18*.

Peak Hour Analysis and Intersections. The WAPs assert that Republic's traffic study is flawed because it did not properly consider peak hour traffic and roadway intersections. However,

the record establishes that Republic's traffic study used the appropriate methodology and was correctly performed. Analyses of peak hour volumes and intersections are not appropriate for evaluating traffic associated with the Brazos Transfer Station. Mr. Jahn testified that he did not perform peak-hour intersection analyses for the Brazos Transfer Station because traffic associated with the facility during the peak periods is minimal and represents insignificant traffic volumes. *Testimony of Brian Jahn, Tr. vol. 5, p.1293/17-24.* The volumes of traffic that the Brazos Transfer Station will generate are not significant by comparison to other (background) traffic on roadways in the area. Even when the transfer station is operating at its full capacity of 1,000 tons per day, vehicles traveling on area roadways to and from the transfer station will not make up more than 5% of the daily traffic on any roadway (1.5% to 4.6% on Nu Energy Drive, 0.18% to 0.27% on East Bankhead Highway, 0.22% to 1.46% on the I-20 frontage roads, and 0.04% to 0.24% on Ranch House Road). *Traffic Study prepared by Brian Jahn, Ex. A-47 at p.17.* Even when operating at full capacity, the transfer station will generate only 641 vehicle trips per day (the largest category of which will "small vehicles", which are passenger cars and pickup trucks). *Testimony of Brian Jahn, Tr. vol. 2 p.410/20-25; Ex. A-83.* Traffic studies are typically not required for projects that will generate fewer than 1,000 vehicle trips per day or fewer than 200 vehicles in a peak hour, and the Brazos Transfer Station will not exceed either of those thresholds. *Testimony of Brian Jahn, Tr. vol. 2 p.408/14-411/20.* However, Brian Jahn did perform a traffic study for the project, Exhibit A-47. Mr. Jahn's study used a 24-hour capacity analysis, the appropriate type of analysis to use in this situation. *Testimony of Brian Jahn, Tr. vol 5 p.1295/17-23.*

Condition of Nu Energy Drive. The WAPs and OPIC suggest that the current condition of Nu Energy Drive should somehow result in the denial of Republic's permit application. However, the record in this case and the law do not support their position. First of all, the WAPs' witness who testified about the condition of the pavement on Nu Energy Drive, Yetkin Yildirim, testified that all of the distress conditions on Nu Energy Drive that he observed and testified about could be corrected with standard maintenance practices. *Testimony of Yetkin Yildirim, Ex. A-95 p.87/9-96/20.* In addition, in addressing issues related to traffic safety and roadway conditions in this case, the TCEQ Executive Director stated

The TCEQ does not have jurisdiction in the permitting process to limit routes taken by commercial trucks, nor is the TCEQ the agency charged with regulating and enforcing traffic safety. The Applicant must comply with any generally applicable local city or county regulations or ordinances that are related to transportation. *See,*

e.g., 30 TAC § 305.122(c). If commercial trucks or other vehicles are observed operating in an unsafe manner, or if trucks are traveling on roads in violation of restrictions, this information may be reported to local law enforcement agencies. If roads need repair, this information should be reported to the appropriate city, county or state road maintenance department.

Ex. A-112, RTC #15, p.13.

Finally, and clearly with regard to the condition of a county road like Nu Energy Drive, the position expressed by the Executive Director is consistent with Texas statutory requirements. Evidence presented by WAP (Parker County Commissioners' Court order and contract) clearly establishes that Nu Energy Drive is a Parker County county road. *Ex. Walsh-45*. The Texas Supreme Court has made it clear that once a county accepts a road as a county road, there is a statutory duty on the Commissioners' Court to make that roadway safe for public travel. *City of San Antonio v. City of Boerne*, 111 S.W3d 22 (2003). It must be presumed that Parker County will comply with its obligations regarding the condition of Nu Energy Drive, and that the road will be maintained in a safe condition for use by the public, including vehicles traveling to and from the Brazos Transfer Station. Contrary to the WAPs' suggestion that such a conclusion "renders TCEQ's rules meaningless", the analysis of this issue in the PFD is clearly consistent with the language of TCEQ's rules and with Texas statutory law, as discussed by the Supreme Court.

4. **GROUNDWATER AND GEOLOGY** (Issues raised in WAPs' Exceptions at Section V)

Information on Geology and Groundwater. The WAPs claim that Republic did not provide adequate information on geology and groundwater and, at page 25 of their exceptions, they actually state that "Commission rules intend that the same level of information be provided for both landfills and transfer stations with regard to characterizing groundwater at a site..." This statement by the WAPs is absolutely absurd. There is an entire section of TCEQ's municipal solid waste rules devoted to describing the investigations and characterizations for and of geology and groundwater that are required to be included in a permit application for a landfill permit. 30 TAC §330.63(e), a section that clearly applies to landfill permit applications and just as clearly does not apply to transfer station permit applications, is entitled "Geology report." The investigations and information required by that section for a landfill permit application include:

(3) a description of the regional aquifers in the vicinity of the facility based upon published and open-file sources that provides:

(A) aquifer names and their association with geologic units described in paragraph (2) of this subsection;

- (B) the composition of the aquifer(s);
- (C) the hydraulic properties of the aquifer(s);
- (D) information on whether the aquifers are under water table or artesian conditions;
- (E) information on whether the aquifers are hydraulically connected;
- (F) a regional water-table contour map or potentiometric surface map for each aquifer, if available;
- (G) an estimate of the rate of groundwater flow;
- (H) typical values or a range of values for total dissolved solids content of groundwater from the aquifers;
- (I) identification of areas of recharge to the aquifers within five miles of the site; and
- (J) the present use of groundwater withdrawn from aquifers in the vicinity of the facility. The identification, location, and aquifer of all water wells within one mile of the property boundaries of the facility shall be provided;

(4) the results of investigations of subsurface conditions at a particular waste management unit. This report must describe all borings drilled on site to test soils and characterize groundwater and must include a site map drawn to scale showing the surveyed locations and elevations of the borings...

(B) Borings shall be sufficiently deep enough to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers. Borings shall penetrate the uppermost aquifer and all deeper hydraulically interconnected aquifers and be deep enough to identify the aquiclude at the lower boundary. If no aquifers exist within 50 feet of the elevation of the deepest excavation, at least one test hole shall be drilled to the top of the first perennial aquifer beneath the site, if sufficient data does not exist to accurately locate it. The executive director may accept data equivalent to a deep boring on the site to determine information for aquifers more than 50 feet below the site. Aquifers more than 300 feet below the lowest excavation and where the estimated travel times for constituents to the aquifer are in excess of 30 years plus the estimated life of the site need not be identified through borings.

(5) ...A brief discussion of geotechnical test procedures including:

...
(C) the depth at which groundwater was encountered and records of after-equilibrium measurements in all borings. The cross-sections prepared in response to paragraph (4)(G) of this subsection must be annotated to note the level at which groundwater was first encountered and the level of groundwater after equilibrium is reached or just prior to plugging, whichever is later. This water-level information must also be presented on all borings required by paragraph (4) of this subsection and presented in a table format in the report;

...
(F) identification of the uppermost aquifer and any lower aquifers that are hydraulically connected to it beneath the facility, including groundwater flow direction and rate, and the basis for such identification (i.e., the information obtained from hydrogeologic investigations of the facility area);

The municipal solid waste rules applicable to a transfer station require only that an applicant "discuss in general terms the geology and soils of the proposed site" (30 TAC §330.61(j)(1)) and "submit data about the site-specific groundwater conditions at and near the site" (30 TAC §330.61(k)(1)). For the WAPs to claim that these dramatically different rules require "that the same level of information be

provided for both landfills and transfer stations with regard to characterizing groundwater at a site" is not only incorrect, it is inexcusable. Furthermore, the record clearly establishes that the information required by the applicable rule provisions (30 TAC §§330.61(j)(1) and 330.61(k)(1)) was provided by way of application Parts I/II Section 9 (General Geology and Soils Statement), *Ex. A-50*, Parts I/II Section 10.1 (Groundwater Statement), *Ex. A-51*, and the groundwater information in Exhibits A-52 and 53.

Protection of Groundwater. The WAPs assert that Republic failed to meet some unspecified requirement regarding protection of groundwater. Republic has designed and planned the construction and operation of the transfer station to prevent the possibility of contaminants leaving the facility, so there will be no source of contamination that could travel to groundwater via any pathway.¹ In addition, TCEQ rules applicable to the permitting of transfer stations do not require

¹ Republic's permit application includes substantial information and analysis regarding surface water near the transfer station site, including the Surface Water Statement in Part I/II (*Ex. A-68, p. I/II-10-1*), *Drawing I/II-2, the Surface Water Drainage Plan in Part III, Attachment 6 (Ex. A-75)* that includes hydrologic and hydraulic analyses of surface water on and near the site, and sections on Contaminated Water Management, Water Pollution Control, and Erosion and Sediment Control, and the Contaminated Water Management Plan in Part III, Attachment 15 (*Ex. A-78*) that describes how contaminants will be managed to protect surface water. Liquids inside the transfer station building will be routed across the sloped concrete floor into concrete floor sumps, then pumped into the contaminated water holding tank. Material collected in the tank will be hauled off-site for management at a TCEQ-approved facility. *Ex. A-78 p. 15-1-1*. There simply is no potential for liquids inside the transfer station building to contaminate surface water.

Regarding leakage from trucks, TCEQ has adopted specific provisions in its municipal solid waste rules that require measures to prevent the leakage of liquid waste, oil or coolant from waste vehicles: 30 TAC 330.105 provides, in part:

- (a) Sanitation standards. All vehicles and equipment used for the collection and transportation of municipal solid waste shall be constructed, operated, and maintained to prevent loss of liquid or solid waste material and to minimize health and safety hazards to solid waste management personnel, the public, and the environment...
- (b) Operating condition of vehicles. Collection vehicles should be maintained and serviced periodically and should receive periodic safety checks. Safety defects in a vehicle should be repaired before the vehicle is used.

Regarding the contaminated water storage tank, it will be designed and constructed to prevent any potential leakage or rupture from being released to surface water. The tank will either be a double-wall, enclosed tank or it will be a single-wall enclosed tank with secondary containment sufficient to detain the entire capacity of the tank, plus freeboard for precipitation. *Ex. A-78 p. 15-1-1*. The testimony of Judy Reeves about the potential for a release of material from this tank was based on her failure to familiarize herself with the design for the tank as described in the permit application and her erroneous assumption that "no secondary containment is planned". *Testimony of Judy Reeves, Ex. Walsh-46 p. 18/22*. In fact, Republic has adequately addressed the potential for leakage or rupture of this tank.

Republic has also prepared and submitted to TCEQ a Storm Water Pollution Prevention Plan (*Ex. A-105*) that addresses, in a comprehensive manner and significant detail, various aspects of the facility design and operation that will prevent contamination of surface water. This plan includes provisions that identify potential

an analysis of potential pathways for contaminants to migrate to groundwater and there is no record of transfer stations impacting groundwater. *Testimony of James Lawrence, Tr. vol. 1 p.254/10-255/21*. This explains why there are no requirements in TCEQ rules to conduct soil borings to investigate the subsurface geology and hydrology at a transfer station site or to conduct groundwater monitoring at an operating transfer station. *Id.* Harold Pearson, the TCEQ Permit Engineer who conducted the technical review of Republic's permit application, testified after he completed his review that, in his opinion, "there should be no groundwater contamination from the transfer station." *Testimony of TCEQ Permit Engineer Harold Pearson, Ex. Walsh-17 p.48/17-18*. Mr. Pearson also testified that, based on his review of Republic's application, the application satisfies, and the proposed operation of the transfer station will satisfy, all applicable requirements in TCEQ's rules. *Testimony of TCEQ Permit Engineer Harold Pearson, Ex. Walsh-17 p.50/7-51/9*.

WAP's geologist, Judy Reeves, testified about her interpretation of the geology at the transfer station site and her opinion that various aspects of the subsurface, including the presence of pipelines on the southern portion of the site and the presence of an aquitard (a formation that acts as a barrier to downward migration of water and contaminants) would provide pathways for contaminated surface water from the transfer station site to move hundreds or even thousands of feet to the south and southeast where water wells (presumably improperly constructed ones without required seals) could offer a pathway to contamination of the Trinity Aquifer well below the surface. In response, Republic would point out that, (1) as discussed above and in Section 4 (Surface Water), there is no potential for contaminants from the transfer station to enter surface water, and (2) in developing her interpretations of the subsurface geology, Judy Reeves relied on drillers logs from nearby water wells. *Ex. Walsh-46 p.16/6-13*. Republic's geologist, James Lawrence testified that, in his opinion and based on his experience, water well drillers logs can be an unreliable source of information to use in geologic characterization. *Testimony of James Lawrence at Tr. vol. 1 p.251/8-9 and 16-18*. Mr. Lawrence also showed the specific lack of reliability associated with most of the well reports shown by the Texas state database to be located near the transfer station site, and concluded that only two wells within 500 feet of the site could be classified as "known wells", the standard in TCEQ's rules for inclusion and consideration of a well, (*Testimony of James Lawrence at Ex. A-48 p.2/29-4/6, Tr. vol. 1 p.267/18-268/9 and 270/13-20, Ex. A-53, and Testimony of Judy Reeves at Tr. vol. 5*

pollutant sources and control measures associated with them and provisions for spill prevention and response.

p.1205/20-22; 30 TAC 330.61(h)(5)). Finally, even though the subsurface geology interpretations offered by James Lawrence and Judy Reeves differ somewhat (based on each geologists opinion about the depth to the aquitard that both agree is present), the evidence in the record shows that those differences would not affect have any affect on the design of the Brazos Transfer Station. *Testimony of Kevin Yard, Tr. vol. 5 p.1286/24-1287/8.*

5. LAND USE

(Issues raised in WAPs' Exceptions at Section VI)

The WAPs complain that the proposed Brazos Transfer Station is not compatible with nearby schools, that the ALJ did not properly consider surrounding land uses in evaluating compatibility, and that the transfer station is not compatible with groundwater well density in the area.

Schools. It is clear that the evidence relied upon by the ALJ regarding land use compatibility did consider schools and their proximity: The land use study report prepared by John Worrall, Republic's land use expert, (*Ex A-20 at p.2 paragraph 5, p.4 paragraph 3, and figure LU-1*) and the land use aerial prepared by Mr. Worrall (*Ex. A-27*) identify, locate and describe the Aledo Independent Scholl District (AISD) schools and other facilities located within one mile of the transfer station site. Republic also prepared and presented a report, Exhibit A-36, that provides information on various existing large transfer stations in Texas and their proximity to schools. The information in Exhibit A-36 shows that there are at least 12 large transfer stations operating in Texas pursuant to TCEQ authorization that are located within one mile of one or more schools. Those 12 transfer stations have a total of 49 schools located within one mile, 6 of the transfer stations are within one mile of at least 4 schools (there are only 3 schools within one mile of the Brazos Transfer Station site), and 13 schools are located closer to these existing transfer stations than the nearest school would be to the Brazos Transfer Station (3,100 feet or nearly 6/10 of a mile).

Although the primary focus of the testimony and exhibits presented by the WAPs in this hearing process related to AISD schools and other facilities, it is noteworthy that in their Exceptions, the WAPs do not even mention any issues specifically related to land use compatibility of the proposed Brazos Transfer Station with schools. Instead, they focus on the lawful use of area roadways by vehicles traveling to and from the transfer station and their claims that this would somehow make the transfer station a land use that is incompatible with those schools. They assert this even though:

- (1) the schools are located 3,100 feet, 4,100 feet and 4,475 feet from the transfer station site (as

the crow flies; farther when traveling by road). See Exhibit A-36;

(2) there is no evidence that students travel to or from school on foot or by bicycle or by any means other than in school buses or private cars;

(3) there is a significant volume of large vehicle traffic associated with other businesses, entities and roadways in the area (see testimony of Robert Sloan regarding the Frac Tech facility and its operation [*Ex. A-82 p. 3/16-42*]; testimony of Hal Ray, Jr. regarding the commercial waste storage and injection well operation on Bear Cat Road [*Tr. Vol. 3 p. 567/11-572/9*]; Exhibits A-102 and A-103, the video and still photos showing land uses in the area near the transfer station site, and the testimony of Barry Hudson related to them, [*Tr. vol. 5 p. 1074/9-1168/16*]; Exhibits A-89 and A-90, the video and still photos showing land uses in the area near the AISD main campus and the testimony of AISD Superintendent Don Daniel related to them, [*Tr. Vol. 3 672/2-689/12*]; and Mr. Daniel's testimony about the 168 school bus trips per day on East Bankhead Highway [*Tr. Vol. 3 p. 635/13-19*]); and

(4) vehicles traveling to and from the transfer station (even when operating at its full capacity) will not make up more than 5% of the traffic on any roadway and will be less than 0.3% (3 vehicles out of 1000) of the traffic on East Bankhead Highway, the major roadway nearest the AISD main campus and the one of most concern to the WAPs. See *Ex. A-47 (Traffic Study prepared by Brian Jahn)*, at p. 17.

For all of the evidence presented by the WAPs about schools and all of the statements in their testimony about "concerns" over how schools could be affected by the Brazos Transfer Station, there is no credible evidence in the record that the facility will have any adverse impact at all on any school.

Compatibility of Land Uses. The WAPs claim that the ALJ and Republic focused their land use evaluations on the area within a ¼ mile radius of the transfer station site and that land uses beyond that area are consistent with growth in residential, not industrial land uses. In response, Republic would initially point out that its application included all information required by TCEQ's land use compatibility rule provision at 30 TAC 330.61(h), including character of surrounding land uses within one mile of the proposed facility; information about growth trends within five miles of the facility with directions of major development; the proximity to residences and other uses (e.g., schools, churches, cemeteries, historic structures and sites, archaeologically significant sites, sites having exceptional aesthetic quality, etc.) within one mile of the facility, the approximate number of

residences and commercial establishments within one mile of the proposed facility including the distances and directions to the nearest residences and commercial establishments, and a description and discussion of all known wells within 500 feet of the proposed facility. *See Ex. A-20 and Ex. A-52.* The TCEQ Executive Director determined that all items of information required by this rule are in Republic's application. *Ex. A-112, Executive Director's Response to Comments #16, p. 14; Ex. A-20.* The transfer station site is located in an area that the WAP's own land use expert, Barry Hudson, says will expand onto even more of the nearby tracts in the future. As John Worrall, Republic's land use witness testified, the area around the transfer station is

a heavy industrial zone with outdoor storage of materials and equipment, storage tanks, metal buildings, fabrication, and truck and heavy equipment movement. There are no sidewalks, no landscaping and in many cases, no paving of parking or storage. The fundamental reason that the proposed transfer station is a compatible use is that its immediate environs are dominated by heavy industrial activities, most of which are associated with the oil and gas industry.

According to the WAPs' own land use expert, Barry Hudson, industrial land uses within one mile of the transfer station will expand significantly to cover more than 263 total acres. The Brazos Transfer Station site (a total of approximately 7.5 acres) will make up less than 3% of that industrial area, and the transfer station building itself, within which all waste processing activities will occur and which will be approximately 9,360 square feet in size (*Ex. A-73, Part III, sec. 3, at p. III-3-1*), will occupy less than 1/1,000th of that industrial area. Republic asserts that the evidence in the record regarding growth trends in the area, including the primary evidence presented by the WAPs' own land use expert, demonstrates that, from a growth trends perspective, the site chosen for the Brazos Transfer Station is an excellent one: the transfer station is located in a growing industrial area located within reasonable proximity to areas where there will be significant demand for solid waste collection services. The transfer station site is surrounded by uses with which it is clearly compatible (John Worrall testified that "The fundamental reason that the proposed transfer station is a compatible use is that its immediate environs are dominated by heavy industrial activities..." (*Ex. A-17 p. 8/21-23*) and, at its proposed location, it can operate efficiently. *See Ex. A-82, Testimony of Republic's Operations Manager Robert Sloan, p. 4/9-37 and Ex. A-17, John Worrall's testimony, p. 11/21-22:* "access is excellent in that it is located immediately off of Interstate 20."

The WAP's own expert witness on land use, Barry Hudson, expects a significant increase in industrial land use in the area around the transfer station site. His land use tables, Exhibits Walsh-56

and Walsh-58 show that the land area within one mile of the Brazos Transfer Station used for industrial purposes will increase by more than 69%. (Compare the total industrial acreage shown on Mr. Hudson's existing and future land use tables, *Walsh-56 and Walsh-58*, respectively.) In addition, Mr. Hudson expects most of the currently undeveloped land between the Willow Park Village (approximately one-half mile west of the transfer station site) and Prairie Ridge (approximately one-half mile east of the site) subdivisions to be used for industrial purposes. (Compare the areas shown in purple on Mr. Hudson's land use maps, *Exs. Walsh-55 [current] and Walsh-57 [future]*). The transfer station site is located right in the middle of this area--an area that all evidence (including Mr. Hudson's) clearly shows is an industrial area now and will be an even larger industrial area in the future. As even Mr. Hudson agreed, it is an area that is appropriate for the location of a transfer station:

Q: Do you consider a municipal solid waste transfer station to be an industrial use?

A: Yes.

(Tr. vol. 5 p. 1172/10-12)

Q: If you were asked by a client to identify appropriate locations for an industrial use within the area shown on this map [Exhibit Walsh-57], what are the areas that you would identify for a new industrial use?

A: Within the areas that are purple.

Q: If the proposed Brazos transfer station site were not shaded with the dark diagonal lines, would you have colored that purple?

A: Yes, I would have.

Tr. vol. 5 p. 1169/15-23

The ALJ's analysis of land use considered all relevant factors and the PFD presents the correct conclusions regarding compatibility of the Brazos Transfer Station with surrounding land uses.

Density of Water Wells. 30 TAC §330.61(h)(5), a rule provision that applies to landfills as well as transfer stations, requires a permit applicant to provide information about "all known wells within 500 feet of the proposed facility", then goes on to state "Well density may be considered for assessment of compatibility." The WAPs suggest that this provision imposes on Republic some burden of proof related to density of water wells and on the ALJ and the Commission some obligation to consider well density in the context of land use compatibility. However, 30 TAC §330.61(h)(5) does not impose any such burden or obligation. The rule says that well density "may be considered." The word "may" obviously makes this provision optional or allowable. Especially in this case, which involves a transfer station and not a landfill, there is no basis for making well

density a part of the land use compatibility evaluation. This provision (well density may be considered) is also a part of TCEQ's rule related to "known wells within 500 feet of the proposed facility", yet the WAP's discussion of this issue addresses water wells within one mile of the proposed Brazos Transfer Station. James Lawrence, Republic's geologist, testified that even if more wells were present within 500 feet of the transfer station site that would not change his opinion that the site is, from a geologic standpoint, well-suited for a transfer station (*Tr. vol. 1 p.270/13-271/9 and Ex. A-48 p.4/8-14*) and Kevin Yard, the project engineer responsible for the design of the transfer station, testified that even a much higher well density than actually exists near the transfer station site would not affect the design of the transfer station:

Q: If there were as many as 18 water wells within 500 feet of the proposed transfer station site, would the design you've done for the proposed transfer station be any different?

A: No, it would not.

Tr. vol. 5 p.1287/9-13

The WAPs claim that well density should be a relevant factor based on their statement that "any waste processing or disposal facility has the inherent potential to contaminate groundwater." The credible evidence in the record regarding *this* facility shows that is simply not the case for the Brazos Transfer Station: see the discussion regarding Protection of Groundwater in Section 4 above. There is no basis in the record for well density to be an issue that affects evaluation of land use compatibility for the proposed Brazos Transfer Station.

6. EASEMENTS AND BUFFER ZONES **(Issues raised in WAPs' Exceptions at Section VII)**

The WAPs suggest that development plans for the proposed Brazos Transfer Station do not comply with applicable requirements regarding easements, as applicable to pipeline easements that cross the site south of the proposed transfer station location. However, in reaching that conclusion, the WAPs misstate and misapply TCEQ rules and fail to properly consider the evidence in the record and the law regarding these easements. The TCEQ easement rule provision that applies to the proposed Brazos Transfer Station is "No solid waste unloading, storage, disposal, or processing operations shall occur within any easement, buffer zone, or right-of-way that crosses the facility", as set out in the first sentence of 30 TAC 330.543(a). The applicable prohibition in TCEQ's easement rules is met as long as the transfer station is designed and operated so that no solid waste unloading, storage, or processing will occur within an easement. The evidence and the law clearly establish that

the Brazos Transfer Station will satisfy this standard. As shown on the Site Layout Plan, Drawing 1B in Exhibit A-74, the transfer station building, within which all solid waste unloading, storage and processing will occur, is not located within any of the pipeline easements. The layout of the easements on Drawing 1B is based on the easement locations shown by a licensed surveyor on the transfer station survey, Exhibit A-81. The WAPs claim that the record does not establish the width of the Diamond Shamrock easement. In response, Republic would point out that Drawing 1B in Exhibit A-74 shows the full width of the Diamond Shamrock easement as 25-feet. The WAPs also attempt to suggest that correspondence between Conoco-Philips (the successor to Diamond Shamrock and current holder of that easement) shows that the easement is really as much as 100 feet wide. However, that correspondence (in the record as Exhibit Walsh-78) and testimony about it show that Drawing 1B was provided to Conoco-Philips, that it conducted an evaluation of the easement and facility and concluded that it did not have any issues with the development of the transfer station as proposed because it is being developed consistent with the definition of the easement, and that Conoco-Philips is now okay with the design of the transfer station. *Testimony of Nicholas Stefkovich, Ex. Walsh-74 pp. 68-73.* The evidence suggests that the holder of the easement is satisfied that it has been properly shown on Drawing 1B. In any event, that easement is legally presumed, per Natural Resource Code §111.0194(a), to be no wider than 50 feet. As shown on Exhibit A-74, Drawing 1B, the centerline of the easement is 37.5 feet from the transfer station building, so even a 50-foot wide easement (25-feet on either side of the centerline) would extend no closer than 12.5 feet to the transfer station. Because the applicable TCEQ rule provision simply says that solid waste cannot be unloaded, stored, or processed within an easement, the design of the Brazos Transfer Station clearly meets that standard.

7. EXHIBITS A-115 AND A-116
(Issues raised in WAPs' Exceptions at Section VIII)

The WAPs claim that the ALJ's action in admitting into evidence Exhibits A-115 and A-116 violated the Texas Administrative Procedures Act and their due process rights. These exhibits present factual evidence: Exhibit A-115 shows that the City of Willow Park has agreed to provide water service to the transfer station from its municipal water system, and Exhibit A-116 shows that Parker County has issued the necessary approval for Republic to construct and operate an on-site sewage facility on the transfer station site to manage domestic wastewater generated at the facility. There is no need, reason, or even jurisdiction for the ALJ or the TCEQ Commissioners to evaluate

these local government actions. Local government approvals (a contract with Willow Park and a permit issued by Parker County) are in place and are not subject to reconsideration, review, or appeal in this proceeding, and the WAPs have not shown, or even pled, that there are any issues related to those factual matters that must be considered in further hearings. The WAPs do not address their Administrative Procedure Act claim at all. They do cite to the case of *Richardson v. City of Pasadena*, 513 S.W. 2d 1 (Tex. 1974), asserting that the case stands for the proposition that "a party's due process rights are violated in an administrative proceeding if a party is denied the opportunity to confront evidence provided by another party." However, an examination of the facts in *Richardson*, the Court's opinion in that case, and the facts in this case show that the due process problem identified by the Court in *Richardson* is not present in this case. In *Richardson*, the appellant complained about testimony in the form of three affidavits that were received and considered by the tribunal (the Pasadena Civil Service Commission) after the hearing closed, even though the affidavits had not been received in evidence in the proceeding. In contrast, in this case, the exhibits to which the WAPs again object were admitted into evidence, in full compliance with TCEQ's rule at 30 TAC §80.4(c)(13) (which states that an ALJ has the authority to reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete) and they are not testimony; they are certified copies of documents establishing actions taken by governmental entities (Parker County and the City of Willow Park). *Richardson* is not applicable to this situation. The ALJ properly admitted Exhibits A-115 and A-116.

8. CITIZENS RECYCLING CENTER

(Issues raised in WAPs' Exceptions at Section IV.D.6 and in OPIC's Exceptions at Section IV)

In their Exceptions, the WAPs refer to evidence consisting of correspondence between Republic and the North Central Texas Council of Governments (NCTCOG) that refers to the recycling drop-off center as relating to recycling goals in the NCTCOG regional solid waste plan (Ex. A-69, pp. 27-42) and the WAPs assert that removal of the citizens recycling drop-off center² from the proposed transfer station facility would result in the record containing no evidence that the facility is in conformance with the regional solid waste plan. The WAPs either failed to look at or

² As described in the record, this recycling drop-off would consist of two roll-off containers into which citizens could place recyclable materials. Ex. A-73, p.III-3-1; Ex. A-74, Drawing 1B.

did not want the ALJ and the Commission to know about other parts of that correspondence (including the two paragraphs immediately following the one referenced in their Exceptions) that clearly show the facility will conform to the plan and goals in it even without the recycling drop-off containers. The correspondence shows that the Brazos Transfer Station will comply with goals and objectives of the plan related to stopping illegal dumping and assuring capacity for trash in the region. *Ex. A-69, pp. 30-31*. In fact, this same correspondence shows that the COG's primary (if not only) basis for determining that the facility will be consistent with the regional plan relates to this last goal: helping meet the capacity needs of the region. *Ex. A-69, p. 27*. The Brazos Transfer Station will conform to the regional solid waste plan even without the recycling containers.

In its exceptions, OPIC suggests that removal of the recycling drop-off from the proposed transfer station may constitute a major amendment to the application that would "require beginning the application and hearing process anew, or [denial of] Republic's application." OPIC's suggestion is without merit and has no basis in TCEQ rules. The only basis offered by OPIC for its claim that removal of the recycling drop-off would constitute a major amendment is that it would "change the proposed waste disposal methods." Even if OPIC were correct that a change in waste disposal methods would always require a major permit amendment, that concept could not apply to this recycling drop-off: recyclable materials are not "waste" and nothing about the activities proposed for the Brazos Transfer Station involves waste disposal, certainly not citizens placing recyclable materials into roll-off containers for subsequent recycling.

9. CITY OF ALEDO'S REQUEST FOR PARTY STATUS

Initially, Republic would object to the filing of exceptions to the PFD by the City of Aledo, an entity that is not a party to this proceeding. The Texas Administrative Procedure Act (at Section 2001.062) and the rules of the Commission (at 30 TAC §80.257(a)) provide only for the filing of exceptions by parties. As a result, the exceptions filed by Aledo should be disregarded. In the alternative, Republic would point out that Aledo's exceptions raise only one issue: that the ALJ erred in denying the request by Aledo's mayor that the City be granted party status, and that in support of its exceptions, Aledo has proffered information and documents that are not only not in evidence in this proceeding, they were not ever offered into evidence at the time of the Mayor's party status request (the March 10, 2010 preliminary hearing in this matter). Republic asserts that the ALJ's decision to deny the party status request made on behalf of Aledo was entirely appropriate and

proper. Even a reading of those facts that the City chose to include in its exceptions shows that the ALJ made the right decision, both on the ground that there was no showing that the City had a justiciable interest in this matter and on the independent ground that the Mayor had not even been authorized to seek party status on the City's behalf. However, perhaps most amazing (even though it is outside the record of this proceeding) is the City's admission, by way of and as set out its Exceptions, that the City Attorney and the Mayor of Aledo were both authorized and directed in June of 2010 to take all actions necessary to obtain party status for the City in this proceeding and to participate in these proceedings on the City's behalf. Even so, neither of them took any action pursuant to such authorization/direction until the filing of Exceptions on the City's behalf, more than 15 months after receiving their direction from the City. Clearly, any ability or right of the City to seek a re-determination of its party status request was waived by its own inaction for such a lengthy period of time, a period during which the actual parties completed discovery, pre-filed evidence, participated in the evidentiary hearing, and prepared and submitted post-hearing briefing—all without the City making any effort at all to participate.

PRAYER

Wherefore, premises considered, Republic respectfully requests that the Commission disregard the Exceptions submitted by Aledo and overrule all other Exceptions, or, in the alternative, overrule all Exceptions; and issue an order granting to Republic a permit for the Brazos Transfer Station, and for such other and further relief as to which Republic may show itself to be justly entitled.


Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 27, 2011 a true and correct copy of the foregoing Applicant's Replies to Exceptions Submitted on Behalf of the Walsh Aligned Parties, the Office of Public Interest Counsel, and the City of Aledo to the September 26, 2011 Proposal for Decision was sent to the TCEQ Chief Clerk, to each party representative, and to counsel for the City of Aledo via fax as shown on the attached service list.


Brent W. Ryan

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From: Brent Ryan

Date: October 27, 2011

Re: Application of Republic Waste Services of Texas, Ltd.
for Municipal Solid Waste Permit 2356
SOAH DOCKET NO. 582-10-2069
TCEQ DOCKET NO. 2009-2058-MSW

Client: 2152-37

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